

Due Process Considerations in Eminent Domain Proceedings
Prepared for the Environmental Quality Council Subcommittee on Eminent Domain
By Gordy Higgins, Legislative Services Division

While the concept of due process relates to every action associated with the crafting and administering of law, the Subcommittee determined that an investigation into how due process relates to eminent domain would yield a better understanding of rights and responsibilities of both the private property owner and the entities possessed with the power to condemn. It would also provide a clear understanding of the powers of the judicial system as it renders decisions about the appropriateness of condemnation actions. The question facing the members is whether the current practice of due process is adequate. While this paper attempts to offer a description of what due process is and how the affected parties' due process rights are guaranteed, it does not offer any judgments about whether the due process rights afforded to participants in a condemnation proceeding are satisfactory. That question is left, appropriately, to policymakers.

Due process is the conduct of legal proceedings according to the established rules and principles for the protection and enforcement of private rights. The due process clauses of the 5th and 14th amendments to the United States Constitution guarantee the rights of all citizens.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* (emphasis added)

The 14th amendment expands the rights guaranteed in the 5th amendment by applying due process rights to the individual states.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

Article II, section 17, of the Montana Constitution echoes the U.S. Constitution's treatment of due process. Article II, section 29, limits the state's right to exercise eminent domain.

Section 17. Due Process of law. No person shall be deprived of life, liberty, or property without due process of law.

Section 29. Eminent Domain. Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

There are two varieties of due process, substantive due process, which is the doctrine that requires legislation to be fair and reasonable in content and to further a legitimate governmental objective, and procedural due process, which comprises the minimal requirements of notice and a hearing, especially if the deprivation of a significant life, liberty, or property interest may occur.

Discussing due process as it relates to eminent domain includes both the substantive and procedural descriptions. Under the definition of procedural due process, several Montana statutes outline the procedure that entities authorized to exercise eminent domain must follow to ensure that the due process rights of the affected property owner are protected.

Procedural Due Process:

Section 70-30-110, MCA, begins the eminent domain notification process by requiring that an entity authorized to use eminent domain to notify the property owner of the entity's intent to locate and survey private land necessary for the completion of a project. Following 30 days' written notice, the authorized parties may enter the land and begin their assessment.

Before a condemnation complaint can be filed with the District Court, the condemnor must demonstrate that it has met the burden of proof contained in section 70-30-111, MCA. The final test, a display that the condemnor has attempted to acquire the property through negotiation, further protects the procedural due process rights of the landowner. While the process defining how the condemnor must engage in the negotiations process is not stated within the statutes, the District Court may not issue a preliminary condemnation order until the court is satisfied that the condemnor has met its burden of proof.

Sections 70-30-110 and 70-30-111, MCA, are intended to satisfy the notification requirement fostered by due process guarantees. The requirement that a fair and open hearing be granted before private property may be taken for a public use is contained in sections 70-30-201 through 70-30-207, MCA, and sections 70-30-301 through 70-30-312, MCA.

Section 70-30-201, MCA, provides that both the plaintiff (condemnor) and the defendant (condemnee) must be notified of the impending judicial proceedings to determine whether a preliminary condemnation order can be issued. Within 6 months of the notification, the court, sitting without a jury, is required to commence its trial.

If the court determines that the condemnation complaint warrants the issuance of a preliminary condemnation order, the defendant must make a claim for just compensation. Section 70-30-207, MCA, provides that if the plaintiff rejects the defendant's claim, the District Court must appoint three condemnation commissioners who will make a determination as to the value of the land proposed to be taken.

With the judge presiding, the commissioners are required to hear testimony of the defendant and plaintiff, as provided in section 70-30-301, MCA. If either party appeals an assessment that was determined by the commissioners, it is required that the case appear before the District Court and be heard before a jury. Finally, if, after the final condemnation order is issued, either party wishes to appeal to the Montana State Supreme Court, they may do so as provided in section 70-30-312, MCA.

Substantive Due Process

Substantive due process relates to eminent domain in the same manner that it relates to other state actions. In each case, the state must craft legislation or pursue policy decisions that further a legitimate governmental objective. Applying this component of due process to eminent domain actions suggests that laws governing the types of uses deemed to be in the public's best interest, the designation of nongovernmental entities authorized to exercise eminent domain, and establishment of laws providing just compensation must provide for the greatest public good with the least private injury.

The power to condemn private property for public uses is an inherent power of sovereign governments. Like the ability to police or tax citizens, condemning private property must result in an action that promotes a benefit to the general public. The 5th amendment to the U.S. Constitution and Article II, section 29, of the Montana Constitution limit the government's ability to condemn private property without regard to individual rights.

The responsibility for determining what legitimate governmental objectives should be furthered falls to the legislative body. The Montana State Legislature has provided a description of what they considered were legitimate governmental actions that could be fostered through the use of eminent domain. Though the list of public uses in section 70-30-102, MCA, reflects the historical period in which the Legislature made their decisions, the vast majority of the western states as well as the rest of the country include these uses within their own constitutions or statutes.

During eminent domain proceedings, both procedural and substantive due process rights are considered by the judiciary, often simultaneously. In essence, the state may not, lest it violate an individual's substantive due process rights, unfairly or unreasonably pass laws that fail to further a legitimate governmental interest. The establishment of those actions that are appropriate for the public's benefit must be balanced by the potential harm caused to a private property owner subject to eminent domain proceedings. Procedural due process rights are protected under the

requirement that a notice be filed and at a minimum, each party has the opportunity to participate in a judicial process.

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